



N<sup>o</sup>. 423 re.

Motion as to counsel

Office Supreme Court U. S.  
FILED

FEB 24 1899

MURPHY McKENNEY,  
Clerk.

Filed Feb. 24, 1899.  
Supreme Court of the United States.

OCTOBER TERM, 1898.

423 re

In re Cases of the Cherokee Nation Pending in  
the Supreme Court of the United States.

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MOTIONS.

Wilkinson Call, attorney and of counsel for Cherokee Nation in all cases pending before the Supreme Court, moves the court for leave to enter H. W. Cockrell as his associate for the Cherokee Nation in the cases pending in this court, and for leave to file his brief in these cases, and to argue them before the court, and that thirty days' time be allowed for this purpose.

The motion is for leave to enter the name of A. W. Cockrell as associate counsel with Wilkinson Call for the Cherokee Nation, and for leave to file a brief from him to be heard in their cases.

The Cherokee National Council alone is competent to authorize attorneys to be employed and to appropriate money for their payment.

(2) The Principal Chief can have no authority without an act of the legislature. He can neither appoint

such attorneys and authorize suit to be brought or defended or expend money of the Tribe or Nation.

(3) The council or legislature enacted a law, herewith submitted as a part of the motion, by which they created a Delegation and appropriated twenty thousand dollars in general fund warrants for the payment of attorney's fees selected and contracted with by the Delegation.

The Delegation possessed under the law sole power and discretion in the selection of counsel and determining the amount of their compensation. An examination of the act leaves no room for doubt or equivocation on this subject. The language is—

“Should it become necessary for the Cherokee Nation or any citizen thereof to appeal to the courts of the United States upon any question involving the right of the Nation to self-government under treaty guarantees and agreements, the Delegation to Washington City are hereby authorized to select and employ for and in behalf of the Cherokee Nation such counsel as they shall deem to be required, and they are authorized to enter contracts accordingly with such counsel in the name and in the behalf of the Nation under the act passed in the Senate December 4, 1897, concurred in by council December 4, 1897. Approved December 4, 1897, by S. H. Mayes, principal chief.”

The delegation made the contract with Wilkinson Call and D. W. C. Duncan, copies of which are hereby submitted. The language of the contract is as follows: “They hereby employ the said Wilkinson Call in all cases that shall come before the Supreme Court of the

United States touching the validity of the acts of Congress of June 10, 1897, taking away the jurisdiction from the courts of the Cherokee Nation." Under this authority the said Wilkinson Call gave his time and attention to their business and has entered his name as their attorney in all their cases pending in the Supreme Court.

All of these cases touch the validity of the acts of Congress taking away jurisdiction from the Cherokee Nation. The question of the right of the citizens, and who are and who are not citizens, but intruders, involves a great part of the property of the Cherokee Nation and their tribal rights under the laws and Treaties of the United States.

It also presents the possibility of collusion and conspiracy between public officials and private citizens, and renders the question of the right of counsel chosen by them by an enactment of public law to be heard in their defense of great importance.

The Chief Mayes, whose telegram has been read here that Mr. Hutchings alone is authorized attorney in their cases, is the person who approved this act and has delivered four thousand dollars of general fund warrants in part performance of it by the Cherokee Nation.

Surely no further statement is needed.

The Cherokee Nation, one of the five civilized tribes, in 1897-1898, by a competent act of legislation, by their council or legislature, enacted the following act:

"An act making an appropriation, and for other purposes.

*Be it enacted by the National Council,* That the sum of five thousand dollars, or so much thereof as shall be necessary, is hereby appropriated, to defray whatever expenses may be incurred in the performance of the duties of the Principal Chief, as defined and imposed by act of the council approved November 29, 1897, and the Principal Chief is authorized to draw warrants accordingly, and in pursuance of the authority given him by said act to engage counsel, when necessary, and to pay whatever expenses may be incurred by the Cherokee Nation, as a party litigant in the defense of the rights thereof.

*Be it further enacted,* That should it become necessary during the business of the delegation for the Cherokee Nation, or any citizen thereof, to appeal to the courts of the United States, upon any question involving the right of the Nation to self-government under treaty guarantees and agreements, the delegation to Washington City are hereby authorized to select and employ for and in behalf of the Cherokee Nation such eminent and learned counsel as they shall deem to be required, and they are authorized to make contracts accordingly with such counsel, in the name and on the behalf of this Nation—the amount to be contracted, to be paid as fee for their services, being left to be determined by the said delegation, according to the circumstances and exigencies of the case, provided that the sum of twenty thousand dollars, or so much of it as shall be necessary, is hereby appropriated out of any money in the general fund not otherwise appropriated for the purpose of paying for the services of said counsel, according to any

contract made by the delegation herein authorized, and the Principal Chief is authorized to draw warrants in conformity with said contract or contracts.

Passed in the Senate, December 4, 1897.

J. C. DUNCAN,  
*Asst. Clerk, Senate.*

WOLFE COON,  
*President of Senate.*

Concurred in by council, December 4, 1897.

WILL W. ROSS, JR.,  
*Clerk, Council.*

E. B. WRIGHT,  
*Speaker pro. tem.*

Approved, December 4, 1897.

S. H. MAYES,  
*Principal Chief."*

"I, C. J. Harris, hereby certify that the above and foregoing one and a fraction pages is a full and true and complete copy of the original act as on file in this department.

This December the sixth, eighteen hundred and ninety-seven.

C. J. HARRIS,  
*Ex-Secretary."*

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In 1898, under this act of the legislature, a delegation was appointed to come to Washington City to contract with attorneys selected by them for the services mentioned in said act.

The said delegates were authorized to expend the twenty thousand dollars appropriated in said act in the payment of attorneys for said services. The said delegation employed the undersigned as their attorney and entered into the following contract with him :

"This contract, made on this twenty-fourth day of February, A. D. eighteen hundred and ninety-eight, be-

tween the undersigned delegates of the Cherokee Nation, parties of the first part, and Wilkinson Call, attorney-at-law, of Florida, party of the second part, witnesseth :

That said parties of the first part do hereby employ said Wilkinson Call as their attorney, to represent them in all cases that shall come before the Supreme Court of the United States touching the validity of the act of Congress of June 10, 1897, taking away the jurisdiction from the courts of the Cherokee Nation ; and further, to co-operate with other attorneys that may be employed, and hereby contract and agree to pay to said Wilkinson Call the sum of seven thousand dollars (\$7,000) in general fund warrants, as per appropriation of the Cherokee national council, approved December 4, 1897.

And the said Wilkinson Call agrees and contracts with them to give the said Cherokee Nation his professional services in the said cases, and in all matters in which they are interested in the present Congress of the United States, before the Departments of the United States, also before the President of the United States, and to oppose all measures detrimental to them. The said contract to extend to and through the next Congress.

And further, the said Wilkinson Call, party of the second part, agrees to do all in his power to obtain the passage of an act of Congress conferring jurisdiction upon the Supreme Court of the United States to decide the rights of the Indians of the Cherokee Nation under the treaties made with them, and requiring said court to entertain such jurisdiction, and finally decide all questions relating thereto.

The said Call also agrees to prepare a bill to be introduced in the Senate and House of Representatives of the United States, at the present session of Congress, to effect this declared object.

In witness whereof, we have this day and year first hereinbefore mentioned, set our hands and seals, in the city of Washington, D. C.

W. A. DUNCAN,  
*Chairman.*

LACEY HAWKINS,  
DANIEL REDBIRD,  
SKAKE MANUS,  
D. M. FAULKNER,  
STEPHEN TEHEE,  
S. R. WALKINGSTICK,  
JOE M. LAHAY,  
*Cherokee Delegation.*

WILKINSON CALL."

Witness :

.....  
.....

" UNITED STATES OF AMERICA, DISTRICT OF COLUMBIA.  
*March 23, 1898.*

Personally came before me, W. H. Duncan, and acknowledged the foregoing signature to be his act and deed for the purpose herein mentioned, and also testifies that he was a witness to the other signatures, and that they were made in his presence and acknowledged by the parties signing the same.

W. H. DUNCAN.

Sworn to and subscribed before me this 23d day of March, 1898.

R. B. NIXON,  
*Notary Public."*



"Upon subsequent consideration, it appearing that the compensation to be paid to Wilkinson Call in pursuance of a contract entered into with him by the undersigned delegation for services as an attorney, the nature of said services being set forth in said contract, which is dated February 24, 1898, is somewhat inadequate to enable said Call to render the fullest services in the premises, it is hereby further agreed by and between said parties to said contract that said second party shall have and receive as additional compensation for said services therein named and set forth the sum of five hundred dollars in general fund warrants, as per appropriation of the Cherokee national council, approved December 4, 1897.

And it is hereby further agreed by and between said first and second parties that this agreement shall be taken and considered as a component part of the said agreement, dated as aforesaid, on February 24, 1898.

This 8th day of March, 1898.

WASHINGTON, D. C.

W. A. DUNCAN,  
*Chairman Delegation.*

STEPHEN TEHEE.  
DANIEL REDBIRD.  
D. M. FAULKNER.  
S. R. WALKINGSTICK.  
SKAKE MANUS.  
LACEY HAWKINS.  
J. A. LAHAY (absent).

WILKINSON CALL,  
*Party of second part."*

" CHEROKEE DELEGATION,  
WASHINGTON, D. C., *April 10, 1898.*

I hereby certify that seven thousand five hundred dollars (\$7,500) is due and payable at this date, and has been since the contract made with Wilkinson Call, attorney-at-law, by the Cherokee Nation, under the act of their council, and that said contract required the payment of said amount in warrants in the Treasury immediately after its execution ; and further, that said Call faithfully and diligently performed his part of said contract and rendered valuable services to said Cherokee Nation, and has the right to payment on that date in February 24, 1898, in registered warrants.

W. A. DUNCAN,  
*Chairman Cherokee Delegation.*

I hereby certify the foregoing to be a true copy of the originals.

WILKINSON CALL.

### **Reply to Mr. Hutchings' Brief.**

In his motion, Mr. William T. Hutchings, signing himself as attorney for the Cherokee Nation, moves that no one but himself shall be allowed by this court to represent the Cherokee Nation in these cases. The reasons he gives in support of this motion are : first, that the Cherokee national council passed the act under which Mr. Hutchings is representing them in citizenship cases in 1896, and the appropriation was exhausted in 1897, under the belief that *no appeal* would be had in such cases, or in other words that the act did not authorize an ap-

*peal*, and in 1897 the council passed the act for the employment of counsel to test the right of Congress to abolish the Cherokee government, etc. This, if true, has nothing to do with the subject. The subsequent act of 1897 took effect over all previous laws, whatever were their enactments.

The language of this act of 1897 speaks for itself and contradicts the statements of Mr. Hutchings. It says "*all cases*" in the Supreme Court touching the validity of the act of Congress, and it is prospective in its operation. The right to determine citizenship in the Indian Territory for the Cherokee Nation touches the validity of the act of Congress and the right of the Cherokee Nation guaranteed by treaty and agreement with the United States. The right to decide who are and who are not citizens is guaranteed to them by treaty. Their constitution and government provides that their council alone shall decide who are citizens. The treaty guarantees to them the removal of all *intruders* or non-citizens and the right of governing their Territory and people.

The act of Congress authorizes the Dawes commission to decide this, with a right of appeal to the United States courts. Nothing can be clearer than that this is a case touching the validity of the act of Congress and the right of the Cherokee Nation to self-government guaranteed to them by treaty and agreement.

If there was any doubt of this, which there is not, there is no reason, in the interest of the Cherokee Nation, why the other counsel employed by the delegation should not be heard and Mr. Hutchings be permitted to

exclude them from the case and from performing the duty entrusted to them.

The Chief Mayes statement is directly contradicted by the act which *he approved*, and has no force or significance ; and is also contradicted by the statement of facts made by Mr. Hutchings in his brief in support of his motion.

The Cherokee council did not entrust the Chief with authority to say who should be their attorneys and who should represent them, but gave this power to a *delegation*. The court will take judicial notice of the report made to Congress by the Secretary of the Interior of the danger of entrusting this power to the executive authority of the five civilized tribes. Eighty-five thousand dollars of fraudulent and spurious warrants of the Creek Nation were paid out of the Creek Trust Funds in the United States Treasury to alleged innocent holders under the collusive exercise of such a power.

See H. R. Doc. No. 499, 55th Congress, 2d Session, 1898.

The office of attorney and counsellor is to inform the court of facts and bring before them principles of law in the interest of the parties they represent, and the court will sometimes call on other counsel as *amicus curiæ* as is implied in the ancient phrase, *curiæ vult advisare*, with which the judges closed the hearing of argument, and there is no reason why counsel should not be heard even where there is doubt as to their authorized employment ; but in this case there is no doubt.

It is of great importance that this court should hear full argument and render final decision. The principles involved determine the final ownership of many millions of dollars in the Treasury of the United States belonging to the Cherokee Nation, and held in trust, which are subject to the decision of this court. It is competent for this court even to appoint counsel to represent these great interests, if necessary to do so, and to provide for their adequate payment, inasmuch as the money and property involved in these cases are a trust in the United States, and the opinion and judgment of this court in the exercise of the jurisdiction conferred by the act, if it be valid, is obligatory on Congress and final as to the rights of the Cherokee Nation and of citizens and intruders.

WILKINSON CALL,

D. W. C. DUNCAN,

*Attorneys for the Cherokee Nation.*

A. H. COCKRELL,

*Associated Counsel and*

*Attorney for the Cherokee Nation.*

N. 423.

OFFICE SUPREME COURT U. S.

FILED

FEB 23 1899

JAMES H. MCKENNEY

*Motion to strike out counsel re*

*Filed Feb. 23, 1899.*  
IN THE

**Supreme Court of the United States**

**OCTOBER TERM, 1898.**

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WM. STEPHENS ET ALS., APPELLANTS,

vs.

CHEROKEE NATION, APPELLEE.

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No. 423, AND ALL OTHER CASES vs. CHEROKEE  
NATION INVOLVING CITIZENSHIP.

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**MOTION.**

Now comes William T. Hutchings, attorney for appellee, and moves the court to strike out the names and appearance of Wilkinson Call and D. W. C. Duncan as attorneys of record for appellee, as they are not authorized to appear in this case.

WILLIAM T. HUTCHINGS,  
*Attorney for Appellee.*

## EVIDENCE IN SUPPORT OF MOTION.

### TELEGRAM.

Dated Tahlequah, I. T., Febr'y 16, 1899.

To W. R. HUTCHINGS,

*Metropolitan Hotel, Washington, D. C.:*

You are the only authorized attorney to represent Cherokee Nation in citizenship cases.

S. H. MAYES,

*Principal Chief, Cherokee Nation.*

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## BRIEF IN SUPPORT OF MOTION.

The facts in this matter are that the Cherokee council passed the act under which counsel is representing it in citizenship cases in 1896, and the appropriation was exhausted in 1897 under the belief that there would be no appeal in such cases. The Indian appropriation bill of 1897 provided that after January 1, 1898, all jurisdiction should be taken away from the Indian courts. This struck at the foundation of their right of self-government. So the council of the Cherokee nation at once made an appropriation in 1897 for the employment of counsel to test the right of Congress to abolish the Cherokee government and to deprive its courts of all their functions. Mr. Wilkinson Call, D. W. C. Duncan, Wm. P. Thompson, the undersigned, and the firm of Stuart, Lewis, Gordon & Rutherford were employed to test this, and several cases are pending with

that view, in all of which Mr. Call has a right to appear. His employment had no reference to citizenship cases. The law bringing them to this court was not passed until June, 1898, and long after his employment in the other matters. None of the other counsel employed are contending that they have any right to appear in these cases. The undersigned has been sole counsel in the citizenship cases since they have been pending in the Federal courts, as the records show.

Respectfully submitted.

WILLIAM T. HUTCHINGS,  
*Attorney for the Cherokee Nation.*